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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
MYRON JAMES HILL, **PAMELA S. HILL,**	**CASE NO. 99-41225-13** **CHAPTER 13**
DEBTORS.	
MYRON JAMES HILL, **PAMELA S. HILL,**	
PLAINTIFFS,	
v.	**ADV. NO. 99-7059**
FIDELITY STATE BANK & TRUST CO.,	
DEFENDANT.	

MEMORANDUM OF DECISION

Both this adversary proceeding and the main case are before the Court following a hearing on August 4, 1999, that dealt with issues about a repossessed truck and confirmation of the debtors' chapter 13 plan. The debtors appeared in person and by counsel Lynn D. Lauver of Topeka, Kansas. Creditor and defendant Fidelity State Bank & Trust Company (Fidelity) appeared by counsel Thomas A. Valentine of Topeka, Kansas. Having reviewed the relevant pleadings and heard argument, the Court ruled generally in favor of the plaintiff-debtors at the end of the hearing, and ordered Fidelity to turn the disputed truck over to them. The Court will now issue this decision to explain its ruling more thoroughly.

FACTS

In January 1998, Fidelity financed the debtors' purchase of a 1994 Chevrolet S-10 Blazer, taking a purchase money security interest in the truck. The debtors defaulted on their payments in June of 1998 but cured the default after Fidelity sent them a right-to-cure notice. The debtors then made their payments until March of 1999, when they again defaulted. They paid the full March payment on April 14 but only part of the April payment. The debtors advised Fidelity that they would make a $400 payment by May 19, 1999, but were unable to do so.

On Thursday, May 27, Fidelity contacted the debtors and asked what they intended to do about their debt. The debtors told Fidelity that they were in the process of filing for bankruptcy and would deal with the debt in that proceeding. Fidelity immediately hired MoKan Central Recovery, Inc., to repossess the debtors' truck, and that company successfully did so, apparently during the evening hours of May 27. Informed the next morning of the repossession, a Fidelity employee, Allan P. Towle, immediately went to the Shawnee County Courthouse and applied for a repossession title. Mr. Towle also wrote and mailed a letter to the debtors informing them that: (1) pursuant to K.S.A. 84-9-504 of the Uniform Commercial Code, Fidelity as secured party intended to dispose of the truck by private sale after ten days had passed following the date of the letter; (2) the balance they owed Fidelity on the truck was $10,981.61 plus $3.12 per day; (3) they had the right to redeem pursuant to K.S.A. 84-9-506 and the power to restrain pursuant to K.S.A. 84-9-507; and (4) Fidelity would be selling the truck pursuant to K.S.A. 84-9-504 and they would remain liable for any balance due following the sale. Later that day, the debtors filed a chapter 13 bankruptcy petition, claiming the truck as exempt property, and filed a reorganization plan in which they proposed to pay Fidelity the value of the truck

over time. According to Mr. Towle's affidavit, on Tuesday, June 1, which would have been the first working day after he applied for the repossession title, another Fidelity employee picked up a certificate of title from a state office that showed Fidelity as the owner of the truck. The copy of a certificate of title that is attached to the affidavit, however, is for a 1994 Ford with a different Vehicle Identification Number than the debtors' Chevrolet Blazer. A copy of this same title is also attached to the proof of claim that Fidelity filed in the debtors' bankruptcy case. The title is prominently labeled a "Repossession" title. Despite Fidelity's error, the Court will assume for purposes of this decision that Fidelity actually did obtain a similar repossession title for the debtors' truck.

A little more than a week after they filed for bankruptcy, the debtors' attorney filed a motion for an order requiring Fidelity to turn the truck over to them. Fidelity objected. About a month later, the debtors commenced an adversary proceeding, asking for turnover of the truck or, in the alternative, for damages for Fidelity's violation of the Kansas Uniform Commercial Code ("UCC") and Uniform Consumer Credit Code ("UCCC"). A short time after the debtors filed the adversary complaint, Fidelity objected to confirmation of the debtors' chapter 13 plan, and asked for stay relief. The parties then agreed to file briefs and submit their dispute over the truck for decision. They agree that the facts stated above are not controverted and that the Kansas UCC and UCCC apply to their financing transaction. The UCCC does not appear to be directly involved in the present dispute, however, and the Court has not relied on its provisions in reaching its decision.

DISCUSSION AND CONCLUSIONS

The debtors contend that Fidelity has either: (1) wrongfully exercised control over property of the estate by refusing to turn the truck over to them; or (2) wrongfully became the owner of the vehicle without complying with applicable provisions of the Kansas UCC and UCCC and is therefore liable for actual and statutory damages and attorney fees. They claim that under Kansas law, they had not only a right of redemption after Fidelity repossessed their truck but also some ownership rights that became property of their bankruptcy estate when they filed their chapter 13 petition. To support their position, the debtors rely on various Kansas statutes, and on *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983), and *In re Sharon*, 200 B.R. 181 (Bankr. S.D. Ohio 1996), *aff'd* 234 B.R. 676 (6th Cir B.A.P. 1999).

Fidelity contends that, under Kansas law, it became the owner of the truck when it obtained the repossession title. The debtors, it continues, no longer had any ownership interest when they filed for bankruptcy but only a right of redemption that would enable them to retrieve the truck only after they paid the full balance owed on the debt plus the costs of the repossession and attorney fees. To support its position, Fidelity also relies on various Kansas statutes and on *Charles R. Hall Motors, Inc., v. Lewis (In re Lewis)*, 137 F.3d 1280 (11th Cir. 1998).

Several provisions of the Bankruptcy Code provide a backdrop for the resolution of this dispute. Upon the filing of a bankruptcy petition, an estate is created which consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C.A. §541(a)(1). Any "entity, other than a custodian, in possession, custody, or control, during the case, of property . . . that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property." §542(a). Fidelity is not a custodian that would be exempted from this

obligation. The debtors have claimed the truck as exempt pursuant to §522(b)(2) and K.S.A. 60-2304(c). In their chapter 13 plan, the debtors have provided that Fidelity will retain its lien on the truck, their default on its debt will be cured or waived, and they will maintain insurance on the truck and pay its value to Fidelity through their plan. So long as they retained sufficient rights in the truck when they filed for bankruptcy that Fidelity was required to return it to them, the debtors' plan treats Fidelity's security interest in the truck as the Bankruptcy Code requires in order for them to retain it (assuming the value they attribute to the truck is not disputed). *See* §1322(b)(2) & (3); §1325(a)(5)(B)(i) & (ii); §361.

The Kansas UCC indicates the debtors retained significant rights in the truck even after Fidelity repossessed it. Because the debtors had defaulted on their debt to Fidelity, it had the right to take possession of the truck without judicial process so long as it could do so, as it did, without breach of the peace. K.S.A. 84-9-503. Under 84-9-504(1) and (3), Fidelity then had the right, among other options, to dispose of the truck by private sale so long as it gave reasonable notice to the debtors of the time after which it would do so; Mr. Towle's letter indicated the bank intended to exercise this option after ten days had passed. Upon sale, Fidelity would be required to apply the proceeds first to the costs of repossession and sale, plus legal fees, then to the debt secured by its lien, and then to any subordinate debt secured by the truck if the holder of that debt met certain requirements; if any surplus then remained, Fidelity would have to give it to the debtors. K.S.A. 84-9-504(1) & (2). According to 84-9-504(4), Fidelity's disposition of the truck would transfer to a purchaser for value "all of the debtor's rights" in the truck, and would "discharge[] the security interest under which [the disposition was] made and any security interest or lien subordinate thereto." Before Fidelity disposed of the truck

or entered into a contract for its disposition, the debtors had the right to redeem it by tendering full payment of their debt, Fidelity's costs of repossessing and preparing the truck for disposition, arranging the sale, and reasonable attorney fees and expenses. K.S.A. 84-9-506. While Fidelity had the truck and had not yet disposed of it, the debtors remained responsible for expenses of preserving it, such as taxes and insurance, although Fidelity would be liable if it failed to use reasonable care in the custody and preservation of the truck. K.S.A. 84-9-207(1), (2), & (3). Because the debtors had paid less than 60% of the cash price of the truck (a consumer good), Fidelity could have retained the truck in full satisfaction of the debt owed to it, if it gave notice of its intent to do so and the debtors did not object. K.S.A. 84-9-505(1) & (2). If the debtors had paid more than 60% and Fidelity did not dispose of the truck within ninety days after repossessing it, the debtors would have had the option to recover from Fidelity for conversion. K.S.A. 84-9-505(1). If Fidelity did not proceed with the disposition of the truck in accordance with part 5 of Article 9 of the UCC, the debtors could obtain an order restraining its actions or recover damages if Fidelity had already disposed of the truck. K.S.A. 84-9-507(1).

Despite these provisions, Fidelity contends that it became the owner of the truck under Chapter 8 of the Kansas Statutes Annotated, entitled "Automobiles and Other Vehicles." It first points to K.S.A. 1998 Supp. 8-126(n), which provides in pertinent part: "'Owner' means a person who holds the legal title of a vehicle . . . or in the event a party having a security interest in a vehicle is entitled to possession, then such . . . secured party shall be deemed the owner for the purpose of this act." It then points out that K.S.A. 1998 Supp. 8-135(c)(2)[1] provides in pertinent part: "When the ownership of

[1]The Kansas Legislature amended 8-135 in 1998 and 1999, but made no changes that affect this decision. *See 1998 Kan. Sess. Laws ch. 140, §8, pp. 835, 839-44; 1999 Kan. Sess. Laws, ch.*

any vehicle passes by . . . repossession upon default of a . . . security agreement, . . . the person owning such vehicle, upon satisfactory proof to the county treasurer of such ownership, may procure a certificate of title to the vehicle." The Court notes that the certificate of title issued to a secured creditor that has repossessed its collateral is, like the one attached to Mr. Towle's affidavit and Fidelity's proof of claim, marked "Repossession," while other certificates of title are not; this seems to indicate that, at least for some purposes, such titles are recognized as being different from ordinary ones. In addition, as used in 8-126(n), the word "deemed" indicates to the Court that the legislature did not believe a secured creditor would ordinarily be considered to be the "owner"of a vehicle merely because it was entitled to possess it, but for some reason, they felt such a creditor should be an "owner" for certificate of title purposes. Furthermore, 8-126(n) specifies the creditor's deemed ownership is only "for purposes of this act"—presumably meaning Chapter 8 of the statutes—indicating it is not necessarily effective for all purposes. These aspects of the Chapter 8 provisions make the Court hesitant to adopt the meaning Fidelity ascribes to them.

As indicated earlier, Fidelity further supports its argument by asking the Court to adopt the Eleventh Circuit's decision in *Lewis*, 137 F.3d 1280. Taking Fidelity's view for the moment, that case could be described as holding that when a car was repossessed two days before the debtor filed for bankruptcy, the debtor no longer had any ownership interest but only a right to redeem the car, so it did not become property of the bankruptcy estate. *Id*. at 1282-85. Such a description, however, overlooks a very significant aspect of the decision: Alabama law determined the scope of the debtor's

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114, §1, pp. 560, 560-66.

interest in the car following repossession. *Id*. at 1283. The Circuit noted that the federal courts in the Northern District of Alabama were apparently split on the question of a debtor's ownership interest in such a vehicle, but concluded that the Alabama state courts were not similarly split. *Id*. In the context of the closely-related law of conversion, the Circuit declared, the state courts had uniformly determined that, despite the adoption of the UCC in Alabama, title and the right of possession pass to a secured creditor upon the debtor's default. *Id*. The Circuit stated:

> Most of [the cited state court] opinions purport to reconcile their outcomes with Alabama's version of Article 9 of the Uniform Commercial Code (U.C.C.), which governs "any transaction (regardless of its form) which is intended to create a security interest in personal property." Ala. Code §7-9-102(a) (1993); [other citations omitted]. Being unable to locate any authority to the contrary, we find significant the state courts' continued reliance on the common law of conversion after the Alabama legislature adopted the U.C.C. in 1965. [Citation omitted].

Id. at 1283-84. The Circuit added that the debtors in its case and an Alabama bankruptcy court had "list[ed] many logical reasons why a debtor upon default should lose only his or her right to possess the secured personalty," citing *Turner v. DeKalb Bank (In re Turner)*, 209 B.R. 558, 564-68 (Bankr. N.D. Ala. 1997), but decided that Alabama law had simply not followed that logic. *Id*. at 1284.

The Court does not believe *Lewis* endorses the reasoning of the Alabama state court decisions as the correct interpretation of the UCC, but merely recognizes them as establishing the Alabama law that applied to the dispute before the Circuit. In fact, at least two bankruptcy courts in other states in the Eleventh Circuit have ruled that the law in their states differed from that in Alabama so that *Lewis* did not control in cases where their states' law applied, and instead a vehicle repossessed prepetition did become property of the bankruptcy estate. *See In re Iferd*, 225 B.R. 501, 502-04 (Bankr. N.D. Fla. 1998); *American Honda Finance Corp. v. Littleton (In re Littleton)*, 220 B.R. 710, 712-15

(Bankr. M.D. Ga. 1998). The Court also notes that, at least for mortgages on real property, Alabama is a title theory state. *See Baxter v. Southtrust Bank of Dothan*, 584 So.2d 801, 804 (Ala. 1991). This means a mortgage holder in Alabama holds legal title to the property and the mortgagor has only an equity of redemption. *Id*. If this theory applies to security interests in Alabama personal property as well, it may explain why Alabama courts would say a secured creditor has title to a vehicle following default and a proper repossession. Kansas, on the other hand, is a lien theory state, *see Citizens Bankr & Trust v. Brothers Constr. & Manuf., Inc.*, 18 Kan. App. 2d 704, 706 (1993), so a mortgage holder here does not own the mortgaged property but only has a lien on it. This distinction gives some indication that Kansas law would treat security interests in vehicles differently than Alabama law does.

Fidelity suggests the logic of two decisions by the Kansas Court of Appeals is similar to that applied by the Alabama state courts relied on in *Lewis*. In *Farmers State Bank v. FFP Operating Partners, L.P.*, 23 Kan. App. 2d 712, 714-15 (1997), that court held that a third party had converted a creditor's security interest in inventory by denying the creditor the right to take possession after the debtor defaulted, and instead selling the property and keeping the proceeds. In *Clark Jewelers v. Satterthwaite*, 8 Kan. App. 2d 569, 572-73 (1983), in the portion of the opinion that Fidelity apparently is referring to, the court held that a secured creditor's cause of action for conversion against a third party to whom the debtor had given its collateral would not accrue until (1) the debtor defaulted, giving the creditor the right to repossess, (2) the creditor demanded return of the collateral from the third party, and (3) the third party refused. While these cases concern the tort of conversion, as did several cases the Eleventh Circuit relied on in *Lewis*, they concern only a secured creditor's right to

assert a conversion claim, not the debtor's right to do so after the collateral has been repossessed. The Eleventh Circuit had relied on two Alabama cases that held a debtor could assert no conversion claim against the secured creditor following repossession because the debtor no longer had any ownership interest in the collateral. *See American Nat'l Bank & Trust Co. v. Robertson*, 384 So.2d 1122, 1123 (Ala. Civ. App. 1980); *Pierce v. Ford Motor Credit Co.*, 373 So.2d 1113, 1115 (Ala. Civ. App.), *writ denied sub nom., Ex Parte Pierce*, 373 So.2d 1115 (Ala. 1979). The Court does not believe that *Farmers State Bank v. FFP* or *Satterthwaite* have anything to say about the debtor's ownership rights after repossession, but only about the secured creditor's rights before repossession.

Fidelity's interpretation of K.S.A. 1998 Supp. 8-126(n) and 8-135(c)(2) brings those provisions into conflict with the provisions of K.S.A. 84-9-207, -504, -505, -506, and -507. After a secured creditor has repossessed its collateral, the UCC nevertheless provides that, in addition to the right to redeem the property, the debtor retains rights and responsibilities inconsistent with a loss of ownership, and that the creditor is responsible to the debtor in ways that a sole owner of the collateral would not be. The debtor remains liable for insurance and certain other costs of maintaining the collateral. 84-9-207(2). The creditor is liable to the debtor if it fails to take reasonable care of the collateral. 84-9-207(1) & (3). The debtor's, not the secured creditor's, rights are transferred to the party that buys the collateral at a public or private sale, and the sale extinguishes the creditor's lien. 84-9-504(4). The redemption right provided by 84-9-506 is the right to retrieve the collateral from the secured creditor by paying the balance owed on the debt and certain other charges, and the right terminates when the collateral is sold at a public or private sale. The public or private sale buyer, having just obtained all rights to the collateral from the secured creditor, would hardly need such a right.

The creditor must also give the debtor any surplus remaining after expenses and secured claims are paid from the sale proceeds. 84-9-504(1) & (2). By objecting to the creditor's notice of intent to retain the collateral in satisfaction of the debt, the debtor can force the creditor to sell the property rather than retain it. 84-9-504(2). A debtor that has paid at least 60% of the purchase price or loan amount for consumer goods before repossession can recover from the creditor in conversion if it does not dispose of the collateral within ninety days of repossessing it. 84-9-505(1). None of these rights and responsibilities are consistent with the theory that the debtor already lost all ownership rights when the collateral was repossessed. In addition, the UCC allows the debtor to recover damages from the creditor if it fails to follow the UCC's rules for disposing of the collateral. 84-9-507(1).

In Kansas, statutory provisions of two or more acts are to be construed, as far as practicable, to be consistent, harmonious, and sensible. *McMillen v. U.S.D. No. 380*, 253 Kan. 259, 268-69 (1993). Besides the UCC provisions just discussed, 8-126(n) itself contains indications that the "ownership" it affords the secured creditor does not override the rights and responsibilities specified in the UCC. First, as indicated earlier, the definition says the creditor is "deemed" to be the owner, indicating that the creditor at least may not actually be the owner. Second, the definition is effective only "for purposes of this act," apparently referring to chapter 8 of the Kansas statutes, and so should not be read to apply outside that chapter. Rather than effecting the full, immediate transfer of all ownership rights, as Fidelity claims 8-126(n) and 8-135(c)(2) do, the Court believes that they serve a meaningful and useful purpose without overriding the provisions of the UCC: they enable the secured creditor to transfer a valid certificate title to the public or private sale buyer at a time when the holder of

the current certificate of title, the defaulting debtor, would be unlikely to cooperate with the repossessing creditor and voluntarily transfer his or her own title to the buyer.

The Court is convinced that the reasoning of *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983) controls the outcome here. In *Whiting Pools*, the Internal Revenue Service had seized property of the debtor before the debtor filed a chapter 11 bankruptcy petition, but had not yet sold it. *Id*. at 200-01. Consequently, the IRS had not supplanted the debtor as the sole owner of the property and the debtor still had rights in the property similar to those the debtors had here under the UCC. *Id*. at 209-11. The debtor sought turnover of the property pursuant to 11 U.S.C.A. §542(a), *id*. at 201, as the debtors did in this case. The Supreme Court reviewed the bankruptcy and non-bankruptcy statutes that applied to the IRS's seizure of the property, the legislative history of §542, and prior case law, and held that the IRS had to turn over to the chapter 11 reorganization estate the property of the debtor that it had seized before the bankruptcy filing. *Id*. at 202-12 The Court ruled that §541 includes in the bankruptcy estate any property made available to the estate by other Bankruptcy Code provisions, and that, with certain exceptions that did not apply in that case (and do not apply in this case, either), §542(a) brings into the estate property in which a creditor has a secured interest at the time of the bankruptcy filing even though the debtor does not then have a possessory interest in it. *Id*. at 202-08. Citing its prior decision in *Wright v. Union Central Life Ins. Co.*, 311 U.S. 273, 278-279 (1940), the Court declared that all bankruptcy law, and specifically §542(a) in this instance, modifies the procedural rights available to a creditor to protect and satisfy its lien, granting the bankruptcy estate the right to possess property that the creditor had seized prepetition, and substituting

various rights for the creditor's right of possession, including the right to adequate protection, while preserving various non-possessory rights granted by other statutes like the UCC. *Id*. at 206-11.

For these reasons, the Court concludes Fidelity was required to return the truck to the debtors pursuant to §542(a), and the debtors are entitled to propose a chapter 13 plan through which they will pay Fidelity the value of the truck.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

Dated at Topeka, Kansas, this ____ day of September, 1999.

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JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE

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FOR THE DISTRICT OF KANSAS

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MYRON JAMES HILL, **PAMELA S. HILL,**	**CASE NO. 99-41225-13** **CHAPTER 13**
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JUDGMENT ON DECISION

Both this adversary proceeding and the main case were before the Court following a hearing on August 4, 1999, that dealt with issues about a repossessed truck and confirmation of the debtors' chapter 13 plan. The debtors appeared in person and by counsel Lynn D. Lauver of Topeka, Kansas. Creditor and defendant Fidelity State Bank & Trust Company (Fidelity) appeared by counsel Thomas A. Valentine of Topeka, Kansas. Having reviewed the relevant pleadings and heard argument, the Court ruled generally in favor of the plaintiff-debtors at the end of the hearing, and ordered Fidelity to turn the disputed truck over to them. The Court has now issued a Memorandum of Decision that explains its ruling more thoroughly.

For the reasons stated in that Memorandum, judgment is hereby entered requiring Fidelity to turn over to the debtors, under the terms of the order entered on August 19, 1999, the 1994 Chevrolet S-10 Blazer that it had repossessed from them just before they filed for bankruptcy.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of September, 1999.

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JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE